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December 17, 1976

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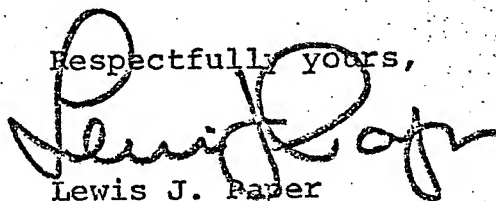
Re: Sam and Juene Jaffe v. Central Intelligence  
Agency and Department of Justice  
Civil Action No. 76-1394

Dear Sir:

Enclosed please find an original and two copies of  
a Supplementary Answer to the Affidavit of the Federal Bureau  
of Investigation in Support of Defendants' Opposition to  
Plaintiffs' Vaughn Motion in the above-referenced matter.

I would very much appreciate it if you could file  
the original and one copy of the Supplementary Answer and  
return the second copy to me marked "Received" in the enclosed  
self-addressed, envelope.

Respectfully yours,

  
Lewis J. Paper

LJP/cjj  
Enc.

cc: Lawrence T. Bennett, Esq.  
Hon. Edward Levi

Hon. George Bush  
Approved For Release 2002/05/20 : CIA-RDP79M00467A000300080001-0  
(Certified Mail, R.R.R.)

EXECUTIVE

IG #49

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SAM AND JUENE JAFFE, : Civil Action No. 76-1394  
Plaintiffs, : Supplementary Answer to Affidavit  
-v- : of the Federal Bureau  
: of Investigation in Support of  
CENTRAL INTELLIGENCE AGENCY : Defendants' Opposition to  
and DEPARTMENT OF JUSTICE, : Plaintiffs' Vaughn Motion  
: Defendants.

On December 8, 1976, defendants submitted the affidavit of Richard G. Kinsey, a special agent with the Federal Bureau of Investigation (hereinafter "FBI"), to support defendants' opposition to plaintiffs' motion for a detailed itemization, indexing, and justification as required by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The 101-page Kinsey affidavit is intended to support defendants' claim of exemption for documents which have been classified pursuant to executive order. (5 U.S.C. §552(b)(1).) The Kinsey affidavit, however, is so replete with contradictions and ambiguities that it raises more questions than it answers. Plaintiffs therefore urge the Court to grant their Vaughn motion and deny defendants' Motion for a Protective Order.<sup>1</sup>

BACKGROUND

On August 27, 1976, plaintiffs filed their Vaughn motion. Defendants filed their opposition on September 8, 1976, stating that, on November 8, 1976, defendants would file affidavits in sup-

<sup>1</sup> On December 3, 1976, defendants filed a motion to prevent plaintiffs from taking depositions and conducting other discovery.

port of their opposition. On November 9, 1976, defendants filed five affidavits supporting their opposition to plaintiffs' Vaughn motion; four of the affidavits were from officials of the Central Intelligence Agency (hereinafter "CIA") and one affidavit, that of a G.R. Schweickhardt, was from the FBI.

The Schweickhardt affidavit listed by number all the documents covered by plaintiffs' request under the Freedom of Information Act, 5 U.S.C. §552 (hereinafter "FOIA"). The Schweickhardt affidavit also specified particular exemptions that were being invoked by the FBI to justify the withholding of FBI records or portions thereof. In many cases, the Schweickhardt affidavit referred to the exemption provided for material classified by executive order. (E.g. Documents 4, 12, 33, 54, Schweickhardt affidavit at 20, 21, 24, 29.) Although his affidavit reflected invocation of the classification exemption, Mr. Schweickhardt stated that he would not address that matter in his affidavit; instead, Mr. Schweickhardt said that the justification for invoking the classification exemption would be explained by another affidavit to be submitted by a different agent of the FBI. (Schweickhardt Affidavit at 5, n.1.) The Kinsey affidavit is the one to which Mr. Schweickhardt was referring.

#### TIMING OF CLASSIFICATION OF DOCUMENTS

At oral argument before the Court on November 30, 1976 -- before the Kinsey affidavit was submitted -- plaintiffs' counsel expressed concern that unclassified material was being or had been stamped "classified" in a post facto manner so as to unlawfully deny plaintiffs access to agency records. This concern was premised, in part, on defendants' long delays in responding to plaintiffs' initial FOIA requests and in responding to plaintiffs'

Vaughn motion.<sup>2</sup> The Kinsey affidavit gives credence to plaintiffs' concern. As explained by Mr. Kinsey, the overwhelming portion of documents requested by plaintiffs were classified after plaintiffs had filed their FOIA request with the Department of Justice. (E.g. Documents 1, 4, 6, 90, 152, 219, Kinsey affidavit at 7-8, 31, 45, 65.) In some cases, the documents were not classified until October 1976 -- more than a month after plaintiffs had filed their Vaughn motion. (E.g. Documents 4, 69, 76, 216, Kinsey affidavit at 7, 25, 27, 64.)

Mr. Kinsey explained this post facto classification by stating that some internal FBI documents could have been classified at their origin but were not. According to Mr. Kinsey, the documents were not classified because they were not intended for dissemination outside the FBI and, therefore, classification seemed unnecessary. (Kinsey affidavit at 3, ¶(4)(b).<sup>3</sup>) This explanation raises serious questions and only underscores plaintiffs' need for additional discovery.

The classification procedure provided by Executive Order 11652 (and its predecessors) was designed to prevent dissemination of information beyond a certain category of persons. As Mr. Kinsey acknowledged, such classifications are available not

2 Plaintiffs filed their FOIA requests with defendants in April 1975. It was not until June 1976, fourteen months later, that defendants informed plaintiffs of defendants' final ruling on plaintiffs' FOIA requests. As explained above, defendants took more than two months to prepare affidavits to explain a process that should have been completed before plaintiffs filed their Vaughn motion; and, in the case of the FBI, the Kinsey affidavit took more than three months to prepare.

3 Throughout his affidavit Mr. Kinsey referred to this explanation as "paragraph 3(B)." Presumably, Mr. Kinsey meant to refer to paragraph 4(b).

only for inter-agency communications but also intra-agency communications. The rationale for classifying internal documents is obvious. Everyone within the FBI (or any investigative agency) does not have the same security clearance. Hence, if the classification system is to serve its stated purposes, documents should be classified even if intended only for intra-agency communication; otherwise, unauthorized persons within the agency might have access to documents for which they do not have the proper security clearance. From this perspective, Mr. Kinsey's reliance on the internal nature of the previously unclassified documents cannot alone justify their delinquent classification. Mr. Kinsey's explanation for the post facto classification of documents is also contradicted by the timely classification of other internal communications between FBI representatives. (E.g. Documents 220, 230, 249, 251, Kinsey affidavit at 65, 68-69, 71. See Documents 47, 100, 114, 200, 213, 218, 222, 225, Kinsey affidavit at 20, 34, 37, 60, 63, 65, 66, 67.)

#### THE MISSING EXPLANATIONS

In at least two cases, Mr. Kinsey failed to provide an explanation for the withholding of records whose exemption was justified by Mr. Schweickhardt as national security classification. (Documents 33, 54, Schweickhardt affidavit at 24, 29.) There is thus no explanation as to why those two documents cannot be released to plaintiffs.

#### THE "NEW" EXPLANATIONS

As explained above, Mr. Schweickhardt cited the classification exemption, 5 U.S.C. §552(b)(1), numerous times to justify the withholding of certain FBI records. Presumably, Mr.

Schweickhardt was able to do this because he had access to all the documents and could see which ones have a classification stamp (even though he himself may not have classified any of them).

Now, Mr. Kinsey identifies as classified many documents for which Mr. Schweickhardt did not invoke the classification exemption. (E.g. Documents 1, 6, 7, 8, 10, 11, Kinsey affidavit at 7-9; Schweickhardt affidavit at 20-21.) There is nothing in the record to explain the inconsistency between the Schweickhardt and Kinsey affidavits. The inconsistency is even more glaring in light of the fact that Mr. Schweickhardt apparently had access to the most recent actions of Mr. Kinsey in classifying the documents. For example, Document 4 was classified on October 4, 1976; in his affidavit, Mr. Schweickhardt duly noted that Document 4 has been classified under Executive Order 11652. Since, Mr. Schweickhardt apparently had close access to Mr. Kinsey's classification of the requested FBI records, and since Mr. Schweickhardt swore that he was "personally familiar with the procedures followed in responding to plaintiffs' FOIA request in particular" (Schweickhardt affidavit at 1, ¶1), the question inevitably arises as to why Mr. Schweickhardt did not cite the (b)(1) exemption for the numerous other documents Mr. Kinsey allegedly classified.

#### THE BROAD SWEEP OF THE CLASSIFICATION STAMP

The law makes it absolutely clear that an agency is required to provide a party with all segregable portions of requested records. (5 U.S.C. §552(b). See Robles v. Environmental Protection Agency, 484 F.2d 843, 848 (4th Cir. 1973).) Mr. Kinsey's affidavit indicates that the classification stamp was used here without regard to this obligation; as a result, plain-

tiffs probably have been unlawfully denied access to segregable portions of certain FBI records.

Virtually every document referred to by Mr. Kinsey has been classified in its entirety. It is hard to believe that, with all of these hundreds of documents, not one portion of any document is segregable. This seems especially inconceivable since many of the documents are quite lengthy. (E.g. Documents 189, 191, Kinsey affidavit at 54-56 -- documents of 69 pages and 19 pages, respectively.) Mr. Kinsey's classification of documents in their entirety also seems strange in light of the fact that Mr. Schweickhardt swore that portions of those "classified" documents have been or will be given to plaintiffs. (E.g. Documents 13, 21, 27, 41, 44, Kinsey affidavit at 10-11, 13, 15, 17, 18; Schweickhardt affidavit at 21, 22, 26, 27.<sup>4</sup>) Either Mr. Schweickhardt made innumerable mistakes or Mr. Kinsey overstepped his bounds in classifying the documents. Plaintiffs -- and the Court -- need additional information to answer this question.

#### BOILERPLATE JUSTIFICATIONS

After describing the general parameters of Executive Order 11652 (and its predecessors), Mr. Kinsey proceeds to cite particular explanations to justify the classification of certain records. However, in offering these justifications, Mr. Kinsey apparently did not consider the specifics of each document.

For example, an oft-cited justification by Mr. Kinsey is that disclosure ". . . would reveal an intelligence source or

<sup>4</sup> In his affidavit, Mr. Schweickhardt identified the particular pages of each document which have been given or will be given to plaintiffs. The number of these pages is denoted by the number in parentheses underneath the identification of the document. (Schweickhardt affidavit at 20\*.)



method." (E.g. Document 1, Kinsey affidavit at 7 (emphasis added).) The use of the disjunctive, "or," is strange here. Either disclosure would reveal an intelligence source or, in the alternative, disclosure would reveal an intelligence method; or, it may be that disclosure would reveal both a source and a method, in which case the conjunctive, "and," should be used. By using the disjunctive, "or," it seems that Mr. Kinsey was providing the FBI with as broad a cover as possible in the hope that the Court would find one alternative reasonable. This procedure is unacceptable here.

FOIA cases are not like other judicial proceedings in which a party can claim alternative grounds for relief. Here, either the records are subject to disclosure or they are not. If the agency has a reason for withholding documents, it has the burden of demonstrating that withholding the document is justified. To satisfy this burden, the agency cannot fish around for an excuse that courts might find reasonable. The agency is obligated to provide the actual reasons for the withholding. In the instant matter, the FBI must make up its mind -- either it classified records because they refer to an intelligence source or to an intelligence method or, if appropriate, both; but the FBI cannot toss off boilerplate justifications in the hope that the Court will not pursue the matter further.

The justifications in Mr. Kinsey's affidavit are especially questionable in light of the age of many of the documents. In some cases, the records are more than 20 years old. (E.g. Documents 1, 4, 6, 7, 8, Kinsey affidavit at 7-8.) In these latter cases, it is hard to understand why the FBI still believes it necessary to classify information concerning a dated "intelligence

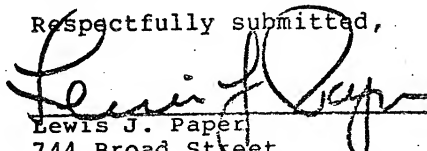
source" or a dated "intelligence method." Likewise, it is hard to understand why the FBI still believes it necessary to classify information concerning "... the FBI's interest in a specific foreign relations matter" that is more than 20 years old. (E.g. Document 4, Kinsey affidavit at 7.)

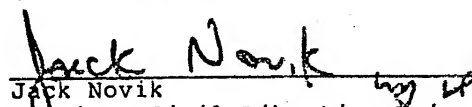
Having failed to provide specific justifications for particular records, and having failed to identify the portions of records to which his explanations refer, Mr. Kinsey has failed to provide plaintiffs with the detailed information they are entitled to under Vaughn v. Rosen, supra.

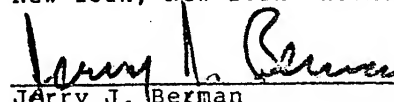
CONCLUSION

WHEREFORE, in view of the foregoing and the pleadings heretofore filed with respect to plaintiffs' Vaughn motion and defendants' Motion for a Protective Order, it is respectfully requested that the Court grant plaintiffs' Vaughn motion and deny defendants' Motion for a Protective Order.

Respectfully submitted,

  
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December 18, 1976

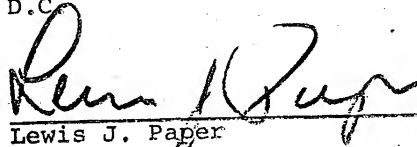
CERTIFICATION

I, LEWIS J. PAPER, hereby certify that I have this 17th day of December, 1976, served copies of a Supplementary Answer to the Affidavit of the Federal Bureau of Investigation in Support of Defendants' Opposition to Plaintiffs' Vaughn Motion by mailing the same, via certified mail, return, receipt requested, to the following parties:

Lawrence T. Bennett, Esq.  
Assistant United States Attorney  
Counsel for Defendants  
U.S. Courthouse - 3411  
Washington, D.C. 20001

Hon. Edward Levi  
Department of Justice  
Washington, D.C. 20535

Hon. George Bush  
Central Intelligence Agency  
Washington, D.C.

  
Lewis J. Paper

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